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IN THE

Supreme Court Of The United States

October Term, 1981

No. ____

Andrew L. Freese, 2d, Petitioner

vs.

United States, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Questions Presented

1. Is the SAWTOOTH ACT an ex post facto law cutting the ground from under the mineral entryman after he initiated a right to purchase his valid locations by patent under the general mining law of 1872 prior to the SAWTOOTH ACT's prohibition of patents?

2. Does the SAWTOOTH ACT violate th Due Process clause of the Vth Amendment to the U.S. CONSTITUTION in prohibiting the completion of the prior, valid locations in the SAWTOOTH NATIONAL RECREATION AREA by patent in only two counties of the U.S. without amending the general mining law of 1872, so that a few miners can no longer obtain title to their property on which their ore deposits are located?

3. Does the SAWTOOTH ACT violate the just compensation clause of the U.S. CONSTITUTION's Vth Amendment in that a taking of one of the entrymen's bundle of interests in their property, the completion of the valid mineral location process by patent, has occurred for the public purpose of Recreation, creating liability for just compensation or invalidation of these sections of the SAWTOOTH ACT.

4. Did Congress intend in the SAWTOOTH ACT by its savings clause "Subject to valid existing rights," for the AREA miners to be compensated for the divestment, restriction, or encumbrance to their property interests by loss of patent out of the $19 million appropriated for land and interests in land, and the $26 million appropriated for acquisition of improvements with or without consent of the owners? Should the Administrators be ordered to pay?

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IN THE

Supreme Court Of The United States

October Term, 1981

No. ____

Andrew L. Freese, 2d, Petitioner

vs.

United States, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, Andrew L. Freese, 2d, respectfully prays that a writ of certiorari issue to review the judgment of the U.S. COURT OF CLAIMS rendered April 3, 1981 and its January 28, 1981 decision, holding that Publ. L, 92-400 §10 & 12, August 22, 1972, 86 Stat 612, 614, 615, 16 U.S.C. §460 aa- 460 aa- 9 &11 (1976) creating the SAWTOOTH NATIONAL RECREATION AREA (SAWTOOTH ACT) do not violate the ex post facto prohibition of the U.S. CONSTITUTION Article 1, Sec. 9 Cl. 3, or the due process and just compensation clauses of the Vth Amendment to the U.S. CONSTITUTION, or the mineral entryman's ordinary right to patent valid mining locations initiated prior to the SAWTOOTH ACT under the general mining law of 1872, 30 U.S.C. §22 et seq.

Opinions Below

The rulings of the U.S. COURT OF CLAIMS, not yet reported, appear in the APPENDIX hereto at App. page A & B below.

Jurisdiction

The judgment of the U.S. COURT OF CLAIMS denying Petitioner's PARTIAL SUMMARY JUDGMENT MOTION, COUNT 1, of is Petition — U.S. COURT OF CLAIMS No. 334-78 — to fix liability on Defendant-Respondent for taking the right to patent from miners in two counties in the United States for the public purpose of Recreation was held January 28, 1981. His timely Motion for en banc review, alteration of that decision, and or remand, was denied, except for the review part, "(U)pon consideration thereof . . . by the seven active judges of the Court" on APR 3- 1981; this petition for ceriorari is being filed within 90 days from that date. The Court's jurisdiction is invoked under Art. III Sec. 1 & 2 of the U.S. CONSTITUTION and 28 U.S.C. §1255 (1); the two decisions are appended below.

Questions Presented

1. Is the SAWTOOTH ACT an ex post facto law cutting the ground from under the mineral entryman after he initiated a right to purchase his valid locations by patent under the general mining law of 1872 prior to the SAWTOOTH ACT's prohibition of patents?

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patent, has occurred for the public purpose of Recreation, creating liability for just compensation or invalidation of these sections of the SAWTOOTH ACT.

4. Did Congress intend in the SAWTOOTH ACT by its savings clause "Subject to valid existing rights," for the AREA miners to be compensated for the divestment, restriction, or encumbrance to their property interests by loss of patent out of the $19 million appropriated for land and interests in land, and the $26 million appropriated for acquisition of improvements with or without consent of the owners? Should the Administrators be ordered to pay?

Constitutional Provisions and Federal Statutes

UNITED STATES CONSTITUTION:

Article 1 Sec. 9. No bill of attainder or ex post facto Law shall be passed.

> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Laws:

16 U.S.C. §460aa-9 Mining Restriction; federal lands withdrawn from location, entry, and patent under United States Mining Laws.

Subject to valid existing rights, all federal lands located in

the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States. Pub. L. 92-400 §10, Aug. 22, 1972, 86 Stat 614

16 U.S.C. §460-aa 11 Patents; restrictions on issuance.

Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States. 16 U.S.C. §460aa-11 (1976), Pub. L. 92-400, §12, Aug. 22, 1972, 86 Stat 615.

16 U.S.C. §460 aa-2 (e) Nothing in sections 460 aa to 460aa-14 of this title shall be construed as limiting the authority of the Secretary to acquire mineral interests in lands within the recreation area, with or without the consent of the owner. Upon acquisition of any such interest, the lands and/or minerals covered by such interest are by such sections withdrawn from entry or appropriation under the United States mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto. Pub.L. 92-400 §3, Aug. 22, 1972, 86 Stat 612

16 U.S.C. 460 aa-14 If any provision of 460 aa to 460 aa 14 of this title is declared to be invalid, such declaration shall not affect the validity of any other provisions of such sections. Pub. L. 92-400 §15, aug. 22, 1972, 86 Stat 615

30 U.S.C. §22. Lands open to purchase by citizens

Except as otherwise provided, all valuable minerals deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. R.S. §2319; Feb. 25, 1980, c. 85, §41, Stat 437.

Federal Questions

At the start of the action below, Petitioner raised the claim in his Petition No. 334-78 to the U.S. COURT OF CLAIMS (and before in his 1976 effort to get into U.S. DISTRICT COURT FOR IDAHO) that a federal questions was involved as to Pub.L. 92-400 being unconstitutional unless just compensation was provided for the interference with the settlers' valid mineral entries, barring them from patenting valid existing locations. Congress, if it could constitutionally do so, intended to take away the ability to patent existing valid mineral locations while harmonizing with the Vth Amendment by providing $46 million for, amongst other purposes, compensating the miners' loss of this interest — their ability to perfect their property interest, their valid locations, by patent, heretofore, and still, inherent in the mining law.

But the U.S. COURT OF CLAIMS in effect held that there was no right to patent a valid location after discovery — if the miner already had his patent, so be it; if miners outside the Recreation Area may continue to complete the process of entry and obtain title so be it; but that the mineral settler in the Sawtooth Area was lawfully deprived, only his ... "opportunities ... somewhat narrowed." Altho selection of time to patent has for a century been the miners' option, Congress took away the patent process in the Area for public recreation.

Arrival at the COURT OF CLAIMS Judgment cites common sense and precedents believed by Petitioner to be inapposite: from page 6 of this January ruling (below) two lieu land cases for damages not liability, an Isolated Tracts case where the ruling declares mining precedents inapposite, and a mining case where the original entryman prevailed against a claim jumper altho patent had not been issued due to incomplete administration of business. Both Defendant and Court of Claims

omitted specific reference to cases cited above by Petitioner, despite procedural history of treating mining issues as of their own kind.

Statement Of The Case

Prior to passage of PUB. L. 92-400, 22 Aug. 1972, this citizen-Petitioner enjoyed five mining locations containing lead, zinc, silver, gold, cadmium, tungsten, antimony, and molybdenum of the elements with associated valuable garnet, epidote, and calcite. In writing, the REGIONAL FORESTER, specially authorized by a 25 year old MEMORADUM OF UNDERSTANDING between INTERIOR AND AGRICULTURE, after swarms of officers examined these locations, wrote they were valid. A claim is valid anyway until proved otherwise; and no contest has been initiated to 1981 on these 100 acres by the Government. Defendant agreed in the course of the argument on this COUNT I, the patent right taking, that the mineral entries be deemed valid.

Congress was advised by INTERIOR's legislative counsel that taking the patent interest would probably require compensation. Chairman Roy Taylor of the HOUSE SUBCOMMITTEE OF NATIONAL PARKS AND RECREATION also stated his view that taking the ability to patent valid existing locations would probably require compensation. The INTERIOR BOARD OF LAND APPEALS noted this point in denying SWANSON (above) patent to his valid mill sites altho he applied in 1967 and 1971 — the later PUB. L. 92-400 being cause for the denial.

Karl L. Landstrom with former professional experience as Assistant Secretary of the Interior, and then member of the Natural Resources Section of the American Bar Association wrote the House of Representatives prior to this laws' passage

> "The Property Clause (Art. 4, Sec. 3, Cl. 2) does not give the United States jurisdiction over its property within the

United States in the legislative jurisdiction sense of Art. 1, Sec.8.Cl. 17 of the Constitution: 01. Sol, Dept. of Agr. No. 10906-10920, May 6, 1924. Therefore the contemplated land use regulation could not be extended by either of the two Secretaries so as to override valid existing rights established by private parties "heretofore" under the laws of the UNITED STATES. Such as rights in lands held under mineral leases or valid mining claims. In other words, the United States is, and should be, bound by the terms and conditions of such mineral and other leases, claims, or permits which may be existence on the day prior to the enactment of this particular legislation. ...If it should be judged essential to take away the right of the holder of a valid mining claim to a patent, the only valid way would be to purchase or by condemnation of the right to a patent. That concludes my statement, Mr. Chairman, except to say that it would be wise to retain the severability clause (sec. 15) inasmuch as, in my judgment, the bill as it now stands contains several clearly invalid provisions."

Petitioner separately had been denied by the Interior Board of Land Appeals, due to this Sawtooth Act, his petition to withdraw the lands from the NationalForest as being more valuable for mineral than agriculture under provision of the Forest Service Organic Act (1897). Notwithstanding the doctrine of superfluous act, Petitioner made inquiry on application to patent his discoveries; and was rebuffed by the Acting Director, Idaho State Office, Bureau of Land Management, on ground that patents could not issue due to Pub.L. 92-400 (above). Congress, while holding the land in trust for the entryman, disposed of it for Recreation, but alleged that the mineral settler could retain use, benefit, and enjoyment of the minerals, so long as this did not disturb the Recreation purpose — as determined, in practice, by the Forest Service officer.

Altho Congress put up the money and authorization to acquire interests, neither the Secretary of Agriculture nor COURT OF CLAIMS has agreed that liability exists for taking the valuable patent right. Unsevered ore is real property, while severed ore is personal property. Petitioner alleges error by the

COURT of Claims in misconceiving Supreme Court decisions. The resolution may be neither "overt bootstrapping" or "judicial reconstruction."

Reasons For Granting The Writ

There is much dumb anger amongst the miners against their own government over this interruption of the ancient mineral entry process by barring, without compensation, purchase of their ore deposits and the lands in which they lie in two counties only, contrary to the general mining law for the public purpose of recreation in a vast stae with under a million population, while other miners in the U.S. may perfect their locations, protect their discoveries and their improvements by patents. It seems a denial of due process to single out those in the Sawtooth Area who were there beforehand. Next, to deny liability and just compensation by changing words from interests in property and rights into options, abilities, and opportunities, thence to find there was no right to patent surviving that constitutes a valuable property interest has produced dissatisfaction with the Government itself — by, of and for what people?

Moreover, the supervisory capacity of the Supreme Court's general constitutional jurisdiction is called in here — by clash in Supreme Court decisions or in the interpretation thereof below. In a sense, the main issue, taking the patent right away from a class of locators in a particular Area, has novelty if HOUSE OF REPRESENTATIVE records are to be believed. A firm of Denver mining lawyers introduced into House records via letter June 14, 1971 (in part):

> "Every prior statute which has withdrawn lands from the public domain has excepted from the withdrawal all valid existing rights. 1 American Law of Mining §2.62. These exceptions have been construed to permit one who lawfully initiated a claim before withdrawal to obtain patent subsequent to withdrawal. Stockley v. United States 260 U.S. 532 (1922). It has always been assumed in the statutes, and

the assumption is supported by case law, that a valid mining claim is an equitable estate in land which includes the right to acquire a patent." Also cited as precedents in this letter were the leading case *Noyes v. Mantle*, 127 U.S. 348 (1888) where the government held the title in trust for the locators: *Fort Maginnis*, L.D. 552 (1881) to same effect; *United States v. Etcheverry*, 230 f.2d 193,197 (10th Circ. 1956), and *Cameron v. United States*, 252 U.S. 450 (1919), as well as *Reed v. Munn*, 148 F. 737 (8th Circ. 1906). *Cert den.* 207 U.S. 588 — all to the same effect that the United States as legal title holder cannot deprive the mining locator of his right to the legal title without just compensation.

Again, in *Andrus v. Shell Oil Co.* et al. by the Supreme Court June 2, 1980 (above) we find the Chief Justice saying that we do not want to cut the ground from under someone who has initiated a right.

Also, 28 USC §671 Clerk (a) The Supreme Court may appoint . . . a clerk . . . 86 Stat 203. A miner likewise may obtain patent of his valid location; it is not discretionary with the Secretary of Interior. But to bar him from paying his $5 an acre fee for patent, then say: look you haven't paid the fee, reduces the citizens' confidence in Government. Such fees are not paid or accepted until the patent issues.

A patent makes permanent the facts on which it is based, secures the discovery and location, protects improvements, and encourages taking the risk to develop basic, rare, and precious metals that a growing population requires — may require more than an enlarged recreation area in the vast, thinly populated Rocky Mountain West, e.g. Custer County is 96% government owned. For the Court below to rule the loss of ability to patent valid locations to be no more than a narrowed opportunity for Area mineral settlers departs from the century old mining law process with a new weapon in the so-called "War against the West." A whole class of citizens is affected; on the Oregon-Idaho border a Recreation Area has been set up also purporting to deprive other mineral settlers of the right to patent. Traditionally,

the flag follows the pick. Now, the flag is chasing the miners right out into the middle of the Pacific Ocean where no country claims sovereignty but many claim control and tax power over would-be nodule miners. Wither away the State? Plenary consideration is required to end confusion in the clash of precedents and interpretations thereof, any conflict of Pub.L. 92-400 with the U.S. Constitution, and in the minds of this basic industry and the mineral settlers. Fear, doubt, uncertainty, confusion paralyze this productive element of society. Patents for inventions may still issue to people of these two counties.

Conclusion

For these reasons, this Court should note probable jurisdiction.

Respectfully Submitted,

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pro see, 62 Stat 944 §1654

Appendix Follows

IN THE

United States Court of Claims

No. 334-78

Andrew L. Freese, 2d

vs.

The United States

Before FRIEDMAN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

Order

PER CURIAM: This case comes before the court on plaintiff's motion, filed March 26, 1981, for review *en banc* of the decision entered herein on January 28, 1981, and for further relief pursuant to Rules 7(d), 151(b) and 152. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestions for review *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for further relief under Rules 151 and 152,

IT IS ORDERED that plaintiff's said motion for review, alteration of the decision and remand is denied.

APR 3 - 1981

In the United States Court of Claims

No. 334–78

(Decided January 28, 1981)

ANDREW L. FREESE, 2d
v. THE UNITED STATES

Thomas H. Borresen, attorney of record, for plaintiff.
Ronald G. Gluck, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

This taking case comes before the court on the parties' cross-motions for partial summary judgment on Count I of plaintiff's petition. Plaintiff is the owner of five unpatented mining claims located on federal lands. In 1972, Congress incorporated these lands into the newly established Sawtooth National Recreation Area (Sawtooth). The law creating Sawtooth expressly terminated the ability of existing claimholders to proceed to patent upon claims located in the recreation area, i.e., to obtain fee title to the lands in which the claims are located. This case concerns the question

whether Congress' action amounts to an unconstitutional taking by inverse condemnation. We hold for the Government. While plaintiff's opportunities have been somewhat narrowed, plaintiff has not suffered a deprivation of "private property" within the meaning of the fifth amendment.

Mining claims upon lands owned by the United States are "initiated by prospecting for minerals thereon, and, upon the discovery of minerals, by locating the lands upon which such discovery has been made. A location is made by (a) staking the corners of the claim. . .(b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office. . . ." 43 C.F.R. § 3831.1 (1979). In order to hold the claim, "not less than $100 worth of labor must be performed or improvements made thereon annually". 43 C.F.R. § 3851.1 (1979). The owner of the mining claim "shall have the exclusive right of possession and enjoyment" of the claim. 30 U.S.C. § 26 (1976). Ownership of a mining claim does *not* confer fee title to the lands within which the claim is located. Fee title passes only upon the issuance of a patent therefor. *See Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U.S. 428, 430 (1892).

> A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person . . . or corporation authorized to locate a claim under . . . this title [Mineral Lands and Regulations in General] . . . having claimed and located a piece of land for such purposes, who has . . . complied with the terms of this title . . . may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim . . . made by or under the direction of the Director of the Bureau of Land Management, showing accurately the boundaries of the claim . . . which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice

that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the Director of the Bureau of Land Management that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of . . . this title. . . .

30 U.S.C. § 29 (1976). *See generally* 43 C.F.R. §§ 3861.1–3864.1–4 (1979).

Between the years 1955 and 1970, plaintiff acquired five unpatented mining claims upon federal lands located in Idaho.[1] In 1972, Congress established the Sawtooth National Recreation Area, including within its boundaries the lands containing plaintiff's claims. Pub. L. No. 92–400, August 22, 1972, 86 Stat. 612, 16 U.S.C. §§ 460aa–460aa–14 (1976) (Sawtooth Act). The Sawtooth Act expressly provides that, "Subject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States." 16 U.S.C. § 460aa–9 (1976). The Act further provides that, "Patents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States." 16 U.S.C. §

[1] The United States has the power under the mining laws to initiate a contest of the validity of unpatented mining locations. *See United States* v. *Springer*, 491 F.2d 239, 241 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). Heretofore, the Government has failed to initiate any such contest against plaintiff's claims. Solely for the purpose of disposing of the pending motions, the Government requests this court to assume *arguendo* the validity of plaintiff's claims.

460aa–11 (1976). The impact of these provisions is that, while the right of possession and enjoyment attaching to valid claims existing upon the effective date of the Act is expressly recognized and preserved, the ability to obtain patents upon these claims is expressly denied. *See* Conf. Rep. No. 92–1276, 92d Cong. 2d Sess., *reprinted in* [1972] U.S. CodeCong. & Ad. News 3047. *See generally* 36 C.F.R. §§ 292.14–292.18 (1979). Plaintiff now contends that he has suffered an unconstitutional taking by virtue of the denial of his ability to obtain patents upon the five unpatented mining claims which he held upon the effective date of the Act.[2] Plaintiff's contention has no merit. There is no maintainable legal theory in support of his view that he has suffered a deprivation of "private property" as that term is used in the fifth amendment.

As Professor Tribe aptly observes: "[N]othing could be clearer, even today, than that a sufficiently unambiguous governmental seizure of private property for public use—a sufficiently clear laying-on of official hands followed by a transfer of possession and title to the general public—is unconstitutional unless followed by payment to the former owner of the fair market value of what was taken." L. Tribe, *American Constitutional Law* § 9–2, at 459 (1978). "'Property', as used in the constitutional provision mandating that property shall not be taken for public use without just compensation, is treated as a word of most general import and liberally construed." J. Sackman, 2 *Nichols on Eminent Domain* § 5.1 [1] (Rev. 3d ed. 1979).

> [T]he corporeal object, (although the subject of property), is, when coupled with possession, merely the indicia—the visible manifestation—of invisible rights. Property in a specified object. . .is composed of the rights of use, enjoyment and disposition of such object, to the exclusion of all others.

Id.[3]

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[2] For purposes of these cross-motions, plaintiff makes no contention that he has actually been hindered in any way in his ability to exploit his mining claims. His argument relates solely to the denial of his ability to obtain patents, i.e., fee title to the lands.

[3] In *United States* v. *General Motors Corp.*, 323 U.S. 373, 377–378 (1945), the Supreme Court wrote:

> The critical terms [in the just compensation clause] are "property," "taken" and "just compensation." It is conceivable that the first [term] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises

—*Cont.*—

It is a matter beyond dispute that federal mining claims are "private property" enjoying the protection of the fifth amendment. Judge Finesilver of the federal district court has nicely summarized the applicable concepts:

> A mining claim is an interest in land which cannot be unreasonably or unfairly dissolved at the whim of the Interior Department. Once there is a valid discovery and proper location, a mining claim, in the language of the Supreme Court, is "real property in the highest sense." Legal title to the land remains in the United States, but the claimant enjoys a valid, equitable, possessory title, subject to taxation, transferable by deed or devise, and otherwise possessing the incidents of real property.

Oil Shale Corp. v. *Morton*, 370 F. Supp. 108, 124 (D. Colo. 1973). Had plaintiff suffered an uncompensated divestment of his federal mining claims, we would have a clear constitutional violation. *See North American Transportation & Trading Co.* v. *United States*, 53 Ct.Cl. 424 (1918), *aff'd*, 253 U.S. 330 (1920). The case before us, however, does not present such facts. Instead, all of plaintiff's "valid existing rights" in his mining claims are expressly recognized and preserved by the Sawtooth Act. His rights of use, enjoyment and disposition in his unpatented mining claims remain undiminished.

Plaintiff's argument rests upon the two following propositions: 1) that his right to the issuance of a patent upon each of his mining claims vested as soon as he completed the discovery and location of each claim, and 2) that, as a consequence, he has suffered an unconstitutional divestment of his vested rights through the denial of his ability to obtain patents upon his claims. Plaintiff is correct in his assumption that the divestment of a vested right to a patent is tantamount to divestment of the patent itself, i.e., a divestment of "property". *See Benson Mining and Smelting Co.* v.

---

rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inherin[illegible] the citizen's relation to the physical thing, as the right to possess, use and dis[illegible]e of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

Alta Mining and Smelting Co., 145 U.S. 428, 431, 433 (1892); *Global Exploration and Development Corp.* v. *United States*, Ct.Cl. No. 135–78 (Order entered Sept. 29, 1978). The flaw in plaintiff's argument, however, inheres in his view that he has a vested right to the issuance of patents. The law is well-settled that this vested right does not arise until there has been full compliance with the extensive procedures set forth in the federal mining laws for the obtaining of a patent. *See Wyoming* v. *United States*, 255 U.S. 489, 497 (1921); *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U.S. 428, 433 (1892); *Willcoxson* v. *United States*, 313 F.2d 884, 888 (D.C. Cir.), *cert. denied*, 373 U.S. 932 (1963); *cf. Andrus* v. *Utah*, ___ U.S. ___, 100 S.Ct. 1803 (1980) (Taylor Grazing Act reserves discretion on the part of Interior Secretary to classify lands within a federal grazing district as proper for school indemnity selection). In this case, plaintiff had not yet taken the first step towards obtaining patents upon any of his mining claims when the Sawtooth Act intervened on August 22, 1972.

The case before us thus ultimately reduces to the question whether plaintiff has suffered an unconstitutional divestment solely by virtue of the fact that he no longer has the option *to apply for* patents upon his claims. Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping.

All other arguments raised by plaintiff, although not directly addressed by this opinion, have been considered and found to be without merit.

Accordingly, after consideration of the submissions of the parties, without oral argument of counsel, plaintiff's motion for partial summary judgment is denied. Defendant's motion for partial summary judgment is granted. Count I of plaintiff's petition is dismissed.

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No. 80-1996

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANDREW L. FREESE, 2D, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAROL E. DINKINS
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QUESTIONS PRESENTED

1. Whether a provision of the statute creating the Sawtooth National Recreation Area, 16 U.S.C. 460aa *et seq.*, that bars the issuance of patents on mining claims on certain public lands constitutes a taking of property within the meaning of the Fifth Amendment where the claim owner took no steps towards obtaining a patent prior to enactment of the statute.

2. Whether Congress provided compensation in that statute for the loss of the option to apply for patents on affected mining claims.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1b-6b) is reported at 639 F.2d 754.

JURISDICTION

The order granting the motion of the United States for partial summary judgment was entered on January 28, 1981. On March 26, 1981, petitioner filed an untimely motion for review en banc (Pet. App. 1a). See Ct. Cl. R. 151(b). The Court of Claims denied the motion, apparently on the merits, on April 3, 1981 (Pet. App. 1a). The petition for a

writ of certiorari was filed on May 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

Between 1955 and 1970 petitioner located five mining claims pursuant to the Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.*, on public lands in Idaho (Pet. App. 3b). In 1972 Congress enacted a statute creating the Sawtooth National Recreation Area (16 U.S.C. 460aa *et seq.* (hereinafter "the Sawtooth Act")) in an area that included the lands on which petitioner's claims are located (Pet. App. 3b). At the time of the Act's passage, petitioner had made no effort to secure patents on any of his claims (*id.* at 6b).

Section 10 of the Sawtooth Act, 16 U.S.C. 460aa-9, provides that "[s]ubject to valid existing rights, all Federal lands located in the recreation area are hereby withdrawn from all forms of location, entry, and patent under the mining laws of the United States." Section 12 of the Act, 16 U.S.C. 460aa-11, provides that "[p]atents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States."

When petitioner inquired, after passage of the Act, about patenting his claims, he was informed by Department of the Interior officials that the Sawtooth Act precluded the issuance of patents on claims in the recreation area (Pet. 7). He commenced this action in the Court of Claims alleging, among other things, that the statutory bar to his acquiring a patent on his claims constituted a compensable taking of his property under the Fifth Amendment. On cross-motions for partial summary judgment, the Court

of Claims held (Pet. App. 3b-6b) that petitioner's unpatented mining claims entitled him to an exclusive right of possession and enjoyment that was expressly preserved by Section 10 of the Sawtooth Act, but that he had no property right in *patents* on the claims at the time of the Act's passage since he had not then taken even "the first step" towards obtaining them (*id.* at 6b). Accordingly, the court held (*ibid.*) that Congress, in the Sawtooth Act, did not deprive petitioner of any property interest for which compensation was constitutionally required.

ARGUMENT

The decision of the Court of Claims is correct, and it does not conflict with any decision of this Court or of the courts of appeals. Review by this Court is accordingly not warranted.

1. Under the general mining law of 1872, 30 U.S.C. 22 *et seq.*, individuals may, upon meeting specified conditions, establish mining claims for minerals on certain public lands, and, if they satisfy certain additional conditions, they may obtain patents on the claims. For the purposes of the partial summary judgment motion in this case, the United States did not contest the validity of petitioner's five mining claims, and it is undisputed that those claims, if otherwise valid, were preserved by the savings clause of the Sawtooth Act insofar as they were valid claims.[1] It is also undisputed that petitioner had not, at the time the Sawtooth Act was passed,

[1] The United States, as the holder of paramount title to unpatented public lands, retains authority to challenge the validity of unpatented mining claims such as those held by petitioner. See *United States* v. *Springer*, 491 F.2d 239, 241 (9th Cir.), cert. denied, 419 U.S. 834 (1974).

satisfied the further conditions that would have entitled him to patents on the claims. The Court of Claims correctly held that he had therefore established no entitlement to this separate property interest prior to passage of the Sawtooth Act.

The primary requirement for obtaining a mining claim is to "locate" a valuable mineral deposit in accordance with applicable laws and regulations. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 606 (1978). One who has established a valid mining claim is entitled to "the exclusive right of possession and enjoyment of all the surface included within the lines of [the] location," and he may extract the minerals found there. 30 U.S.C. 26; *Andrus* v. *Charlestone Stone Products Co., supra*, 436 U.S. at 606. As the Court of Claims correctly noted (Pet. App. 5b), this possessory interest is a property right that Congress may not constitutionally take without providing compensation. *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 644 (1935). Congress, of course, did not take petitioner's possessory interest in his claims because that interest is preserved as an "existing right" by Section 10 of the Sawtooth Act, 16 U.S.C. 460aa-9.

Petitioner's contention that by precluding him from obtaining a patent on his claims after passage of the Sawtooth Act, Congress deprived him of a compensable property interest is not supported by the cases on which he relies (Pet. 8-9) and is refuted by other decisions of this Court. To be sure, *Noyes* v. *Mantle*, 127 U.S. 348 (1888), and *Cameron* v. *United States*, 252 U.S. 450 (1920), refer in dicta to equitable rights of persons with unpatented claims, for whom the government holds title "in trust" (127 U.S. at 351; 252 U.S. at 460-461). But *Benson Mining &*

Smelting Co. v. *Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), makes it clear that petitioner could claim no equitable right in a patent before he had filed an application with all the requisite supporting proofs and proffered the acreage payment required by 30 U.S.C. 29.[2] Thus *Benson*, quoting from an opinion of the Secretary of the Interior, describes (145 U.S. at 430) "three distinct classes of title[]" under the mining laws: (1) fee simple title, obtained through patent; (2) "title by possession," meaning the exclusive possessory rights obtained through establishing a valid claim, which may be defeated if the party in possession fails to comply with the annual work requirements for maintenance of the claim (see 30 U.S.C. 28 *et seq.*); and (3) the "complete equitable title." The significance of the third category is explained by the Court's reference to "well-considered opinions" of Interior Department officials holding that "when the price of a mining claim has been paid the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work, the delay in issuing the patent being a mere matter occurring in the administration of the Land Department, and the patent when issued by relation taking effect as of the date of the purchase" (145 U.S. at 430). As the Court reiterates in *Benson* (*id.* at 431-432), in language later quoted in *Wyoming* v. *United States*, 255 U.S. 489, 497 (1921): "[W]hen the price is paid the right to a patent immediately arises."

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[2] The requirements for a patent include showing a "valuable mineral discovery," marking the boundaries of the claim, providing notice to possible adverse claimants, submitting proof that at least $500 in labor was expended on the claim, and paying a fee equivalent to $5 per acre. 30 U.S.C. 29. See *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1369 (9th Cir. 1976).

That theory of the establishment of an entitlement to a patent is consistent with decisions of the Court under the homestead laws that bear directly on the taking issue. See, *e.g.*, *Frisbie* v. *Whitney*, 76 U.S. (9 Wall.) 187 (1870); *The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77, 87 (1873); *Campbell* v. *Wade*, 132 U.S. 34 (1889). As the Court in *Campbell* explained (132 U.S. at 37-38; emphasis added):

> The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the preemption laws of the United States, large portions of public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Frisbie* v. *Whitney*, 9 Wall. 187, where this doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case*, 15 Wall. 77, 87, where the court said that *until all the preliminary steps prescribed by law for the acquisition of the property were complied with*, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price.

See also *Stockley* v. *United States*, 260 U.S. 532, 540 (1923) (settler entitled to patent on land claimed under homestead laws where he "had done everything which the law required on his part").

When the Sawtooth Act was passed, petitioner had not only failed to pay the acreage fee prescribed by 30 U.S.C. 29, but he had taken none of the preliminary steps to apply for a patent. The power of Congress to preclude the issuance of patents on his claims was therefore in no way impaired. See *United States* v. *Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956) (location of a mining claim gives the locator "only the right to explore for and mine minerals, and to purchase the land *if there has been a compliance with the provisions of the statute*" (emphasis added)). Accordingly, the Court of Claims correctly held (Pet. App. 6b; emphasis in original) that petitioner "suffered [no] unconstitutional divestment solely by virtue of the fact that he no longer has the option *to apply for* patents upon his claims." [8]

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[8] As indicated above, petitioner's reliance (Pet. 8-9) on *Noyes* v. *Mantle*, *supra*, *Cameron* v. *United States*, *supra*, *Stockley* v. *United States*, *supra*, and *United States* v. *Etcheverry*, *supra*, does not advance his argument. His citations to *Reed* v. *Munn*, 148 F. 737 (8th Cir. 1906), cert. denied, 207 U.S. 588 (1907), and *Andrus* v. *Shell Oil Co.*, 466 U.S. 657 (1980), similarly do not aid his case. *Reed* concerned rights of the owners of valid but unpatented mining claims against attacks on the claims themselves during the period prior to patent. The issue in *Shell Oil* was the effect of a savings provision in the Mineral Lands Leasing Act of 1920, 30 U.S.C. 193, on the validity of pre-1920 oil shale mining claims. Unlike the Sawtooth Act, the Mineral Lands Leasing Act provided that existing claims could be "perfected" under the mining laws, and it contained no provision precluding the issuance of patents on claims after the Act's effective date. 30 U.S.C. 193. *Shell Oil* thus decided nothing bearing on the question whether Congress may, without providing compen-

2. Petitioner also appears to argue (Pet. 5) that he is entitled to compensation by the terms of the Sawtooth Act alone. He suggests that Congress in fact recognized the compensability of the option to patent a claim and provided compensation for such interests in Section 13 of the Act, 16 U.S.C. 460aa-12, authorizing some $19 million for "acquisition of lands and interests in lands" for the recreational area and some $26 million for its development. This contention is without merit because it ignores the effect of Section 12 of the Act, precluding the issuance of patents on claims after the effective date of the Act.

The United States already holds title to the land that petitioner seeks to patent (see page 3 note 1, *supra*); and unless Section 12 is a nullity, the only interest that the Secretary of the Interior could acquire from petitioner is his possessory interest in the claims. Congress cannot reasonably be deemed to have appropriated funds for the future acquisition of something that it has simultaneously provided will not thereafter exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
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Attorneys

JULY 1981

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sation, cut off an unexercised option to apply for a patent on a mining claim.

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No. 80-1996

IN THE

Supreme Court Of The United States

October Term, 1980-81

Andrew L. Freese, 2d, Petitioner

vs.

United States, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY

ANDREW L. FREESE, 2d
Petitioner, pro se
1605 Resseguie
Boise, Idaho 83702
Tel. (208) 342-6602

July 1981

Questions Presented

1. Is the SAWTOOTH ACT an ex post facto law cutting the ground from under the mineral entryman after he initiated a right to purchase his valid locations by patent under the general mining law of 1872 prior to the SAWTOOTH ACT's prohibition of patents?

2. Does the SAWTOOTH ACT violate the Due Process clause of the Vth Amendment to the U.S. CONSTITUTION in prohibiting the completion of the prior, valid locations in the SAWTOOTH NATIONAL RECREATION AREA by patent in only two counties of the U.S. without amending the general mining law of 1872, so that a few miners can no longer obtain title to their property on which their ore deposits are located?

3. Does the SAWTOOTH ACT violate the just compensation clause of the U.S. CONSTITUTION's Vth Amendment in that a taking of one of the entrymen's bundle of interests in their property, the completion of the valid mineral location process by patent, has occurred for the public purpose of Recreation, creating liability for just compensation or invalidation of these sections of the SAWTOOTH ACT.

4. Did Congress intend in the SAWTOOTH ACT by its savings clause "Subject to valid existing rights," for the AREA miners to be compensated for the divestment, restriction, or encumbrance to their property interests by loss of patent out of the $19 million appropriated for land and interests in land, and the $26 million appropriated for acquisition of improvements with or without consent of the owners? Should the Administrators be ordered to pay?

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APPENDIX 8

IN THE

Supreme Court Of The United States

October Term, 1980-81

No. 80-1996

Andrew L. Freese, 2d, Petitioner

vs.

United States, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

I

This July 1981 BRIEF IN OPPOSITION defaults on the first two questions presented. From the start in 1978 in the original PETITION below to February 1981, the unconstitutionality of PUB.L. 92-400 (SAWTOOTH ACT) Sec 12 was presented on the prohibition of ex post facto law and its conflict with the due process protection of the Fifth Amendment, which includes life, liberty, as well as property. Defendant relies on shrinking the questions presented from four to two, making brief comment inescapable.

In pristine March 16, 1810, we find the great CHIEF JUSTICE himself saying "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."; *Fletcher v. Peck*, Mass. 1810, 10 U.S. 87, 6 Cranch 87, a property case. And recently we note "Vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and therefore are deserving of sanctions, not that it failed to sanction others similarly." *U.S. v. Brown*, Cal. 1965, 85 S.Ct. 1708.

As to the second question presented but omitted by Defendant, the due process clause says ". . . not be deprived of life, liberty, or property without due process of law . . ." This clause means more than staying off the chopping block or out of jail. For example, in *KENT v. Dulles*, 357 U.S. @ 125, Justice Douglas for the majority: "The right to travel is part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment." The right to patent a valid claim is a substantial liberty established for a century. Any process is not due process.

Petitioner avers this COURT need look no further past the Government's ommission to deal with Question 1 and 2 presented (Pet. inside cover) to find P.L. 92-400 Sec 12 unconstitutional on its face.

II

On page 1 of BRIEF FOR THE UNITED STATES IN OPPOSITION, error avers that on March 26, 1981, an untimely motion for review en banc was filed. Counsel has the record showing that the MOTION was filed timely Feb. 1981. Answer by Defendant was then replied to by Plaintif, all prior to decision printing April 3, 1981 (Pet. App 1a) hardly possible if MOTION had been filed March 26, 1981. Petitioner calls it prejudicial under the circumstances for the Government to try to take advantage of a typographical error by COURT OF CLAIMS itself in the

printing of the denial of the en banc review MOTION, which did NOT rule the timely MOTION to be untimely. That MOTION intended to introduce newly discovered evidence regarding, among other things, affidavits from officials of a mine previously operating with 26 miners that closed after the Sawtooth Act, yet was offered by Defendant as an example of mining undisturbed by the SAWTOOTH ACT.

III

The actual first step to patent is location with recordation of valid discovery, followed by inquiry at the office that issues them. Agreement of parties exists that this much was done (Opposition 2). Since INTERIOR took the position that the SAWTOOTH ACT precluded the issuance of patents, despite the savings clause "Subject to valid existing rights" (Sec. 10), one of which was the right to patent both ore and land, further first steps were effectively barred by the Government. Petitioner frequently has called attention in the record that Elmer Swanson's extensive "first steps" in 1967 and 1971 to patent valid locations were denied in 1974 by INTERIOR BOARD OF LAND APPEALS, citing the SAWTOOTH ACT and calling attention to the opinion of CHAIRMAN ROY TAYLOR, HOUSE Sub-Committee Parks and Recreation to the view that taking the patent right probably required compensation. Petitioner could not reasonably be expected to have been treated otherwise.

Thus elaborate contentions smoothly suggesting Petitioner at fault for omitting to do what he is obstructed from doing by the Government are not relevant, but distracting. The Government while holding title in trust for the valid locator disposed of it anyway for public recreation without test as to whether one or all heretofore settlers would by access to the long established patent process harm the recreation purpose, without test of the effect on the miners' ordinary use of their property. Petitioner, for example was threatened with trespass if he continued to build a small tool house and a legally required powder house in an obscure place on his own valid locations — an

assault not available to Government if the land was patented. Nor have scenic easements been paid to any miner in the AREA, altho control of his improvements is manifest.

If test is made on Defendant contention that there is no conflict in any decision of this COURT with COURT of CLAIMS decision, a contrary finding occurs.

In *Andrus v. SHELL OIL CO.*, 466 U.S. 657 (1980) which among others Government alleges do not aid his case (Brief 7), we find the CHIEF JUSTICE saying there is no time limit to perfect the location process by patent. Yet this is what the SAWTOOTH ACT has done — not giving five years to the heretofore miners but by stopping them altogether including SWANSON (above) who applied a priori.

Another area of agreement lies on BRIEF 4, where *NOYES v. MANTLE*, and *CAMERON v. UNITED STATES* refer to the Government holding title "in trust". This agreement, glossed over, lasts till the next word; "BUT", indicating a clash in decisions by the following BENSON interpretation by DEFENDANT, which conflicts with the normal interpretations even of *Benson* that a miner was protected even if certificate of title was not issued. One notes also (BRIEF 4) that NOYES AND CAMERON "refer in dicta"; why are there no dicta in BENSON? Noted further is that *UTAH* relied on heavily below has dropped out of the case already, perhaps because in this action below the case was bifurcated into liability and damages by stipulation. Also disappearing is the ISOLATED TRACTS case declared inapposite to mining in the original decision (WILLCOXSON) but relied on below anyway. Tragedy to dispossessed homesteaders, but the Government virtuously urges that there is no dispossession of Sawtooth miners, so due process attaches its shield to the expectation of patent.

No conflict? In the recreation Series 460 a thru z of TITLE 16, we discover 10 statutes relating to mine patents in a manner that could hardly be more capricious if by design. These AREAS cover time from 1965 to 1980. Only the SAWTOOTH ACT flatly prohibits patents of valid locations heretofore made. Compare this flat prohibition of the SAWTOOTH ACT's Sec. 12, which IS an unconstitutional nullity (BRIEF 8) with the section of the KING RANGE CONSERVATION AREA.

> KING RANGE CONSERVATION AREA 16 USCS § 460y-6
> **§ 460y-5. Applicability of mining laws; prospecting commenced or conducted and mining claims located subsequent to October 21, 1970 as subject to regulations; patents issued on mining claims located subsequent to October 21, 1970 as subject to regulations; provisions of regulations; rights of owner of existing valid mining claim as unaffected**
>
> (a) Subject to valid existing rights, nothing in this Act [16 USCS §§ 460-y et seq.] shall affect the applicability of the United States mining laws on the federally owned lands within the Area, except that all prospecting commenced or conducted and all mining claims located after the effective date of this Act [Oct. 21, 1970] shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this Act [16 USCS §§ 460y et seq.]. Any patent issued on any mining claim located after the effective date of this Act [Oct. 21, 1970] shall recite this limitation and continue to be subject to such regulations. All such regulations shall provide, among other things, for such measures as may be reasonable to protect the scenic and esthetic values of the Area against undue impairment and to assure against pollution of the streams and waters within the Area.
>
> (b) Nothing in this section shall be construed to limit or restrict rights of the owner or owners of any existing valid mining claim.
>
> (Oct. 21, 1970, P. L. 91-476, § 6, 84 Stat. 1070.)

Petitioner submits that the above legislation squares with the CONSTITUTION, while the SAWTOOTH ACT's Sec. 12 does not.

BRIEF IN OPPOSITION p. 6 avers treatment of homestead laws govern treatment of mining locations, which have long and usually been regarded as of their own kind. General propositions do not decide particular cases — HOLMES. If there are no conflicts, why does DEFENDANT need to go outside the mining law to buttress its OPPOSITION?

Therefore, to show the COURT the conflict at least of lawyer views, the full text of the letter found on pages 183-184 of HEARINGS BEFORE SUB-COMMITTEE ON NATIONAL PARKS AND RECREATION, held June 7 & 8, 1981, Serial No. 92-13, 92d Congress, 1st Session is appended altho already in the record below.

IV

As the record below shows, high government officials in both the executive and legislative branches not only deemed it reasonable but probable that the taking of the patient right in the SAWTOOTH ACT would require compensation.

Defendant's BRIEF sometimes finds opinions of INTERIOR DEPARTMENT have weight; sometimes not.

BRIEF IN OPPOSITION p. 8 is averred to contain faulty logic. Question 4 presented notes that BECAUSE of Sec. 12, taken with opinion in both executive and legislative branches of probable requirement to compensate fo. the patent right taking, Congress may have intended that the sums in question are to be used in part for that very purpose. Without this, Sec. 12 is indeed a nullity. The funds under Sec. 12 are not for future acquisition of patents, but taking the right to patent heretofore valid locastions from the miners in two counties only, BLAINE & CUSTER, IDAHO. Petitioner avers things have been twisted around here.

V

CONCLUSION

The Government does not argue THIS COURT's jurisdiction, instead, holding that the COURT below did not err; and PETITION FOR WRIT OF CERTIORARI should be denied.

In view of the inability of the Government to face the first two issues presented in the PETITION at all, and the conflicts averred with regard to the meaning of the law and dispute over precedents, and how the law squares with the Constitution on the 3d and 4th issues presented, the need for plenary review of the action below is indisputable; indeed petitioner suggests that summary reversal is now in order.

Respectfully submitted,

Andrew L. Freese, 2nd
Petitioner

JULY 1981

APPENDIX FOLLOWS

HOLLAND & HART,
Attorneys at Law,
Denver, Colorado, June 14, 1971.

MR. KEITH WHITING,
Supervisor, American Smelting and Refining Co.,
Spokane, Wash.

DEAR MR. WHITING: You have asked us for our opinion as to whether Section 14 of H.R. 6957 (A Bill to establish the Sawtooth National Recreation Area) constitutes a violation of the constitutional limitation that private property shall not be taken for public use without just compensation. Section 14 provides that "patent shall not hereafter be issued for locations and claims heretofore or hereafter made in the area . . ." The bill specifically provides that it "shall not be construed as preventing or interfering with the full exercise of the rights of the holder of a valid claim to further prospect, develop, and mine any such claim . . ."

Therefore, it would seem that the issue raised by Section 14 is whether Congress can constitutionally deny the holder of a valid claim the right to proceed to patent. Our conclusion is that the present statutory right of a valid claimholder to proceed to patent is a property right which becomes vested when a claim is located and which cannot be constitutionally divested by the Government without payment of compensation.

Every prior statute which has withdrawn lands from the public domain has excepted from the withdrawal all valid existing rights. 1 American Law of Mining § 2.62. These exceptions have been construed to permit one who lawfully initiated a claim before withdrawal to obtain a patent subsequent to withdrawal. *Stockley v. United States*, 260 U.S. 532 (1922). It has always been assumed in the statutes, and the assumption is supported by case law, that a valid mining claim is an equitable estate in land which includes the right to acquire a patent.

In *Fort Maginnis*, 1 L.D. 552 (1881), the Secretary of War desired an opinion of the Attorney General as to whether mining claims located prior to the reservation might thereafter be taken to patent. The Attorney General answered that "so long as [the locater] complies with the conditions imposed by [the mining laws]" those laws confer possessory rights which, as "recognized by Congress, are property of great value". The Attorney General thus concluded that:

"That where such rights are attached to mineral land in favor of the locater of a mining claim the land during the continuance of the claim (i.e., so long as it is maintained in accordance with law) . . . cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the executive for other uses." 1 L.D. at 554.

In *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956), the court held that a valid unpatented mining claim carries with it an "absolute" right to the issuance of a patent and that the issuance of the patent was therefore not discretionary with the Government. The Court said:

"*When a mining location is perfected* and there has been compliance with the statute, the owner has an absolute right to purchase a fee title to the land at any time thereafter." 230 F.2d at 197. (Emphasis added.)

It is clear then that a claim must only conform to the law under which it was initiated in order to vest in the claimant the right to a patent, which right is subject to divestment only upon failure to fulfill the statutory conditions existing at the time of the location of the claim. *Cameron v. United States*, 252 U.S. 450 (1919). In the leading case of *Noyes v. Mantle*, 127 U.S. 348 (1888), the Supreme Court commented upon the nature of the estate granted upon the perfection of a mining claim when it stated:

"They had thus done all that was necessary under the law for the acquisition of exclusive right to possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued, *the government held the title in trust for the locaters or their vendees. The ground itself was not afterwards open to sale.*" (Emphasis added.)

The premise that the estate granted to the mining locater is a vested equitable fee simple estate is supported by the fact that the legal title obtained by the patentee relates back in point of time to the date of the original location. *Reed v. Munn*, 148 F. 737 (8th Cir. 1906), *cert. den.* 207 U.S. 588. While the Government continues to hold the naked legal title to the land prior to the issuance of a patent and while the estate of the locater is subject to divestment for failure to fulfill the statutory requirements, it is our conclusion that the estate granted to the locater is vested and [t]he United Sta[t]es as legal title holder cannot deprive the mining locater of his right to the legal title without making just compensation.

You have asked us also for our opinion as to whether or not compensation would be required if valid unpatented claims were condemned by the Government. It has been repeatedly held that a valid mining claim is an interest in real property in the fullest sense of the term. *Wilbur v. United States*, 280 U.S. 306 (1930). It is not disputed that a valid mining claim on public land, as yet unpatented, cannot be taken from the owner thereof under the power of eminent domain

except on the payment of just compensation. *North American Transportation & Trading Co. v. United States*, 253 U.S. 330 (1920). *Phillips v. United States*, 243 F.2d 1 (9th Cir. 1957).

If you have any questions in regard to the above, please feel free to contact me.

Yours very truly,

FRANK H. MORISON.

Mr. McClure: I have no questions.

Mr. Lloyd: No questions.

Mr. Taylor: Thank you very much, Mr. Whiting.